

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
)
Request of Inforum Communications, Inc. for)
Petition for Reconsideration and Waiver Request)
for Late Acceptance of BTA Installment Payment)
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Order

Adopted: January 7, 2004

Released: January 8, 2004

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. Introduction

1. This Order responds to the request filed on behalf of Inforum Communications, Inc. (“Inforum”) seeking reconsideration and waiver of the Commission’s installment payment rules.¹ Specifically, Inforum requests waiver of Section 1.2110(g)(4) of the Commission’s rules with respect to its obligation to make an installment payment for a Multipoint Distribution Service (“MDS”) license for the Sarasota, Florida BTA (MDB408) (the “License”) and reconsideration of the automatic cancellation of the License.² Pursuant to Section 1.2110(g)(4), because Inforum’s overdue installment payment and applicable late fees were not paid by July 31, 2001, *i.e.*, within two quarters of their original due date, Inforum was in default, its license cancelled automatically, and it is subject to debt collection procedures.³ Inforum, however, requests that the Commission acknowledge acceptance of its late installment payment as a constructive waiver of Section 1.2110(g)(4)(ii) of the Commission’s rules and allow Inforum to retain the License.⁴ For the reasons set forth below, we deny the Petition for Reconsideration and request for a waiver of Section 1.2110(g)(4).

¹ Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of Installment Payment, dated October 30, 2001 (“Request”).

² 47 C.F.R. §1.2110(g)(4)(iv).

³ *Id.* Pursuant to Section 1.2110(g)(4)(iv), Inforum has two quarters following the original payment due date during which it may make the overdue payments with the applicable late fees. *See id.*

⁴ Request at 1.

II. Background

2. On October 6, 1999, the Commission granted an application assigning the License from Paradise Cable (Paradise) to Skylynx Communications, Inc., which later changed its name to Inforum Communications, Inc. (FCC File No. BMDAL-990709XV).⁵ On July 18, 2001, Inforum filed an application seeking to assign the License to TDI Acquisition Corporation (TDI).⁶ On July 31, 2001, Inforum failed to make a late installment payment for the License. Inforum acknowledges that, pursuant to the Commission's automatic cancellation rules, its failure to pay a late installment payment together with applicable late fees by July 31, 2001, caused it to be in default and that the License cancelled automatically on August 1, 2001.⁷ On October 30, 2001, Inforum filed the instant Request. The Application seeking assignment from Inforum to TDI remains pending subject to the Commission's resolution of Inforum's request for reconsideration and waiver of the Commission's installment payment rules.⁸

3. In its Request, Inforum contends that its failure to make the required installment payment was the result of an administrative oversight and that a payment was wired on August 2, 2001.⁹ Inforum therefore requests that the Commission acknowledge acceptance of this wire payment as a constructive waiver of Section 1.2110(g)(4)(ii) of the Commission's rules, and allow Inforum to retain the License so that it may transfer the license to TDI.¹⁰

III. Discussion

4. To obtain a waiver of the relevant rules, Inforum must show either that (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹¹ As discussed below, Inforum fails to make either showing necessary to support granting a waiver of the Commission's installment payment rules.¹²

5. Inforum fails to show how the underlying purpose of the rules would not be served, or would be frustrated by application of the rules in this instance. The Commission's competitive bidding rules, including the automatic cancellation rule, serve several statutory objectives enumerated in Section

⁵ Request at 2; *see also Public Notice*, Report No. 115 (Oct. 6, 1999).

⁶ FCC File No. BALMD-20010718AAC (filed July 18, 2001) (Application). Paradise filed a Petition to Deny the Application on August 31, 2001. *See Paradise Cable, Inc. Petition to Deny* (filed Aug. 31, 2001) (Petition). The former Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau subsequently determined that Paradise's filing was an untimely attempt to seek reconsideration of the assignment of the License from Paradise to Inforum, and dismissed the Petition for lack of standing. *In Re Inforum Communications, Inc., Assignor and TDI Acquisition Corporation, Assignee, For Assignment of Multipoint Distribution Service (MDS) Stations KNSC300 and KNSC798, and WM1303 Sarasota Florida, and of the Sarasota, Florida BTA (MDB408), Memorandum Opinion and Order*, 18 FCC Rcd 18508 (WTB PSPWD 2003) (application for review pending).

⁷ *See* 47 C.F.R. § 1.2110(g)(4)(iv); Request at 1.

⁸ The instant Order does not address or resolve the pending application for review or the pending Application.

⁹ Request at 1.

¹⁰ *Id.*

¹¹ 47 C.F.R. §1.925.

¹² *Id.*

309(j)(3) of the Communications Act.¹³ Specifically, the automatic cancellation rule serves a crucial function in the competitive bidding process that the Commission uses to assign licenses. In designing its auctions, the Commission has determined that assigning licenses to the qualified applicant willing to pay the most for the license promotes several statutory objectives, including the effective deployment of the service most highly valued by the public.¹⁴ Precluding winning bidders, or subsequent licensees, from keeping a license when the winning bid is not paid pursuant to the Commission's rules, minimizes bidders' incentive to make bids that they cannot pay. This, in turn, makes it possible for other bidders that will pay their bids to win the licenses through an auction. This process protects the integrity of competitive bidding and is essential to a fair and efficient licensing process for all participants in a Commission auction, including both those who won licenses and those who did not, which promotes economic opportunity and competition in the marketplace.¹⁵

6. Inforum's argument that the grant of this waiver would allow for the finalization of a sale of the License to TDI and thereby provide for expedient service to the public ignores the fact that grant of such a waiver would undermine the auction and licensing process.¹⁶ This license was conditioned upon the full and timely performance of the payment obligation, which Inforum failed to fulfill. The Commission repeatedly has emphasized that strict enforcement of the installment payment rules enhances the integrity of the auction and licensing process by ensuring that spectrum is awarded to those qualified bidders who value the spectrum most and that winning bidders have the necessary financial capacity to build out systems and provide service.¹⁷

7. There is also nothing unique or unusual regarding Inforum's alleged factual circumstances. Inforum's representation that a pending license assignment to TDI would put the license into the hands of a third party that would be required to pay the remaining obligation in full is unremarkable. The Commission has repeatedly held that "the existence of a potential assignee does not

¹³ See 47 U.S.C. §309(j)(3).

¹⁴ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360-61, ¶ 70 (1994) ("*Competitive Bidding Second Report and Order*"). The Commission assigns licenses based on license applicants' competing bids. Each of those bids presumably reflects the estimated value of the prospective service to the public and the applicant's effectiveness in providing it. See *id.*, 9 FCC Rcd at 2360-61, ¶ 70 ("[T]he market value assigned to licenses via the auction process can be expected to reflect the benefits to both consumers and producers, now and in the future.") Moreover, assigning licenses based on competing bids reduces administrative and judicial delay by using a simple and objective standard to compare competing applicants.

¹⁵ See Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25,113, 25,123-24, ¶ 22 (2000) ("*21st Century MO&O*"), *aff'd* 21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. Federal Communications Commission, 318 F3d 192 (D.C. Cir. 2003).

¹⁶ See Letter to Russell H. Fox, Esq., Counsel for Capital Two-Way Communications, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-1319 (2001) ("*Capital Two-Way Letter*").

¹⁷ In Re Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in Cleveland, TN BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 25,103, 25,110-11, ¶ 15 (2000) (*Southern MO&O*); *21st Century MO&O*, 15 FCC Rcd at 25,117-18, ¶ 10. See also Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10,853 (1996); Letter to James A. Stenger, Esq., Counsel for Allen Leeds, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 17,621, 17,623 (2001) (citing Application for Assignment of Broadband PCS Licenses, FCC 98-301, *Order*, 14 FCC Rcd 1126, ¶ 1 (1998)).

negate the licensee's failure to comply with the Commission's rules."¹⁸ Thus, Inforum's negotiations with TDI regarding an assignment of license do not present unique or unusual factual circumstances that support a grant of a waiver.¹⁹

8. Further, Inforum's argument that a lack of coordination between its two principal officers, and not a lack of funds, led to its inability to make a timely payment also fails to demonstrate unique or unusual circumstances.²⁰ Something as common as two principal officers being out of the office on travel at the same time does not rise to the level of a unique or unusual circumstance that warrants special consideration by the Commission. In the instant matter, Inforum admits that it received not one, but two, separate notices from its legal counsel alerting it of its responsibility to make a payment to the Commission.²¹ Yet, despite those notices, Inforum concedes that the payment deadline was missed because no one with authority was present in the office to access the funds in a timely manner.²² As the Commission has stated previously, "[a] prudent licensee would have prepared for the unexpected by having a back-up person ready to make the payment."²³

9. Moreover, Inforum fails to present a compelling argument that automatic cancellation is inequitable under these circumstances. In fact, despite admitting that its CEO realized in basically the last minute of the eleventh hour that it had not made the payment that was due by July 31, 2001, Inforum nonetheless attempts to shift the blame for its own business shortcomings to the Commission.²⁴ Inforum's allegations that the Commission's actions contributed to the "confusion surrounding the payments for the Sarasota BTA"²⁵ license are unpersuasive. The Commission has determined that two extra quarters after the installment payments are due is sufficient time to allow licensees to address unanticipated difficulties in making installment payments.²⁶ The Commission has also held that "the inability of a licensee to obtain up to the minute information from the Commission regarding the processing of payments does not relieve a licensee of the responsibility to manage its own financial records."²⁷

10. Although Inforum attempts to argue that the Commission's payment records and Inforum's consultations with Commission staff somehow provide equitable support in favor of granting a waiver, Inforum itself recognizes that it did not discover any of the alleged record inaccuracies until after

¹⁸ *Capital Two-Way Letter* at 3; see also Letter to J. Curtis Henderson, Senior Vice President and & General Counsel for Nucentrix Spectrum Resources, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 02-41 (2002) (declining to grant a waiver for an administrative oversight in payments while the licensee was in negotiations to assign its license to a third party).

¹⁹ *Id.*; see also *Southern MO&O*, at ¶ 15.

²⁰ Request at 6; see also *Southern MO&O*, at ¶ 10.

²¹ Request at 4.

²² *Id.*

²³ See *In Re Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block License in Cleveland, TN BTA, Order*, DA 99-2375 at ¶ 4 (1999); *aff'd Southern MO&O*.

²⁴ *Id.* ("On July 31, 2001 at 4:05 pm, Inforum's Chief Executive Officer attempted to contact counsel in response to the July 25th notice.")

²⁵ *Id.* at 11-15.

²⁶ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 439-440, ¶ 110.

²⁷ *Southern MO&O* at ¶ 10.

the late payment deadline had passed and the licenses had automatically cancelled.²⁸ Moreover, Inforum also admits that it was taking advantage of the Commission's quarterly grace periods, and "had been submitting only the payments necessary until it closed its transaction with TDI, knowing that the BTA would be paid in full upon completion of the transaction."²⁹ Thus, Inforum, and not the Commission, is responsible for the consequences that flow from such a business decision. Furthermore, as the Commission has repeatedly stated, it is a licensee's "obligation to ascertain the correct amount and due date of [an] installment payment."³⁰ We therefore disagree with Inforum that any of these arguments provide support for the grant of a waiver.

11. Finally, Inforum erroneously contends that its situation is analogous to those where the Commission has found that "as a result of administrative oversight . . . a constructive waiver of the installment payment deadlines had occurred."³¹ In the cases cited by Inforum, it was the Commission's administrative oversight, and not the licensee's, that amounted to a constructive waiver. Contrary to Inforum's argument, the mere mechanical acceptance for filing of Inforum's assignment Application on August 3, 2001 does not rise to the level of Commission action that could reasonably be construed as constructively waiving the July 31, 2001 installment payment deadline. And, as the Commission has stated, acceptance of a late payment does not revive an automatically cancelled license.³²

IV. Conclusion and Ordering Clauses

12. For the reasons set forth above, application of the automatic cancellation rule in this case will not frustrate the underlying purpose of the rule, is not contrary to the public interest and is not inequitable, unduly burdensome, or otherwise contrary to the public interest.

13. Accordingly, IT IS ORDERED that the Request dated October 30, 2001 filed on behalf of Inforum seeking Petition for Reconsideration and for waiver of the Commission's rule governing installment payment deadlines (47 C.F.R. §1.2110(g)(4)) is DENIED.

14. IT IS FURTHER ORDERED that a copy of this ORDER shall be sent to Inforum and its representatives by certified mail, return receipt requested.

²⁸ Request at 14 ("Not until Inforum contacted Commission staff immediately upon realizing that it missed the July 2001 payment did it discover just how inaccurate the Commission's records were.").

²⁹ *Id.* at 15.

³⁰ *21st Century MO&O* at ¶ 16.

³¹ *Id.* at 8.

³² See e.g., Lakeland PCS LLC., *Second Report on Reconsideration*, 15 FCC Red 23,733 (WTB 2000).

15. This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

Margaret Wiener
Chief, Auctions and Spectrum Access Division
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³³ 47 C.F.R. § 0.331.